TAN SRI ERIC CHIA

v.

PEGUAM NEGARA

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[COURT REVISION NO: R1-25-253-2004]
26 DECEMBER 2004

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for leave - To quash Attorney General's request to judicial authority in Geneva and Zurich to record taking of evidence - Whether Attorney General's act amounted to an interference with judicial powers of sessions court judge - Mutual Assistance in Criminal Matters Act 2002, s. 8(1) - Rules of the High Court 1980, O. 53 r. 2(4) - Federal Constitution, art. 145(3)*

CONSTITUTIONAL LAW: *Attorney General - Attorney General's request to judicial authority in Geneva and Zurich to record taking of evidence - Whether an exercise of prerogative - Whether amounted to an interference with judicial powers of sessions court judge - Mutual Assistance in Criminal Matters Act 2002, s. 8(1) - Rules of the High Court 1980, O. 53 r. 2(4) - Federal Constitution, art. 145(3)*

CONSTITUTIONAL LAW: *Courts - Judicial power - Attorney General's request to judicial authority in Geneva and Zurich to record taking of evidence - Whether Attorney General's act amounted to an interference with judicial powers of sessions court judge - Mutual Assistance in Criminal Matters Act 2002, s. 8(1)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Criminal proceedings in sessions court - Whether High Court as a civil court had jurisdiction to review proceedings - Whether tantamount to interference with jurisdiction of sessions court*

CIVIL PROCEDURE: *Jurisdiction - High Court - Criminal proceedings in sessions court - Whether High Court as a civil court had jurisdiction to review proceedings - Whether tantamount to interference with jurisdiction of sessions court*

This was an application by the applicant for leave to commence proceedings under O. 53 r. 3 of the Rules of the High Court 1980 ('the RHC') for an order of *certiorari* for the purpose of quashing the respondent's requests to the judicial authority in Geneva and Zurich, Switzerland, purportedly pursuant to the provisions of the Mutual Assistance in Criminal Matters Act 2002 ('the Act'), to record the taking of oral evidence of witnesses and production of documents for the purpose of using the said evidence and/or documents in the trial at the sessions court between the applicant and the public prosecutor. The respondent raised several preliminary objections, among which were: (i) that the taking of evidence under the Act was part and parcel of the respondent's exercise of his prerogative under art. 145(3) of the Federal Constitution and that such exercise was not amenable to review by the courts; (ii) that the civil courts should not interfere in the jurisdiction of the criminal courts; and (iii) that the request of the respondent under s. 8 of the Act was not within the requirements and meaning of O. 53 of the RHC. In effect, the real issue requiring serious consideration was whether the act of the respondent in invoking s. 8 of the Act in the midst of the applicant's criminal trial could be construed as an intrusion and interference with the judicial powers of the sessions court judge.

Held (dismissing the application):

[1] This court was unable to agree with the respondent that the requests of the respondent to the judicial authority in Geneva and Zurich under the Act were not decisions within the meaning of O. 53 r. 2(4) of the RHC. Section 8(1) of the Act clearly relates to the powers and discretion conferred and imposed on the Attorney General and indicates a discretionary decision needing to be made to result in such requests. Thus, the requests by the judicial authority in Geneva and Zurich were decisions within the requirements and meaning of O. 53 of the RHC. (p 456 f-h)

[2] Clearly, what the respondent did in Geneva and Zurich was not "to institute, conduct or discontinue any proceedings for an offence". The respondent could not be said to be exercising his prerogative under art. 145(3) of the Federal Constitution, and in fact, as the Attorney General of Malaysia, had no jurisdiction to "institute, conduct or discontinue any proceeding for an offence" outside Malaysia. (p 459 a)

[3] Looking at the scheme of the Act, the respondent's act did not amount to an intrusion or interference with the judicial powers of the sessions court judge. The recording of evidence in Geneva and Zurich under s. 8(1) of the Act was not a continuation of the applicant's criminal trial at the sessions court in Kuala Lumpur. The sessions court judge's powers were still very much intact because under the scheme of the Act, any evidence collected in Geneva and Zurich would still be subjected to the scrutiny of the sessions court judge before such evidence could be admitted and considered. (p 459 d-e)

[4] This court, being a civil court, had no jurisdiction to review the proceedings before the sessions court in exercise of its criminal jurisdiction. Any challenge by the applicant to the prosecution's attempt to adduce the evidence recorded in Geneva and Zurich should be made to the sessions court judge and it was for him to decide whether such evidence was admissible or not. Therefore, to accede to this application would tantamount to this court interfering with the jurisdiction of the sessions court, which was totally unacceptable. (p 460 b-c)

Legislation referred to:
Federal Constitution, art. 145(3)
Mutual Assistance in Criminal Matters Act 2002, ss. 8(1), (3), (4), 9
Penal Code, s. 409
Rules of the High Court 1980, O. 53 rr. 2(4), 3

For the applicant - Mohd Shafee Abdullah (Azizan Harun with him); M/s Shafee & Co
For the respondent - Ummi Kalthum Abdul Majid (Abdul Rahim Uda & Azizah Hj Nawawi SSFC with her)

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:
This is an application by Tan Sri Eric Chia (the applicant) for leave to commence proceedings under O. 53 r. 3 of the Rules of the High Court 1980 (RHC) for the following reliefs:

(i) An order of *certiorari* to remove into this Honourable Court for the purpose of quashing the request made by the respondent to the judicial authority at Geneva, Switzerland purportedly pursuant to the provisions of the Mutual Assistance in Criminal Matters Act 2002 to record the taking of oral evidence of witnesses and production of documents for the purpose of using the said evidence and/or documents in the trial at Sessions Court at Kuala Lumpur Arrest Case No: 62-48-2004 between the Public Prosecutor and Tan Sri Eric Chia Eng Hock; and

(ii) An order of *certiorari* to remove into this Honourable Court for the purpose of quashing the request made by the respondent to the judicial authority at Zurich, Switzerland purportedly pursuant to the provisions of the Mutual Assistance in Criminal Matters Act 2002 to record the taking of oral evidence of witnesses and production of documents for the purpose of using the said evidence and/or documents in the trial at Sessions Court at Kuala Lumpur Arrest Case No: 62-48-2004 between the Public Prosecutor and Tan Sri Eric Chia Eng Hock; and

(iii) Prohibition to prevent any further action being taken by the respondent pursuant to the existing requests for examination of witnesses and production of documents made to the judicial authority in Geneva and Zurich, Switzerland and/or any future requests made by the respondent premised upon similar facts and circumstances; or

(iv) Alternatively, a declaration that the requests made by the respondent to the judicial authority in Geneva, Switzerland pursuant to Part II of the Mutual Assistance in Criminal Matters Act 2002 is unconstitutional and/or otherwise is an abuse of legal process; and

(v) A declaration that the requests made by the respondent to the judicial Authority in Zurich, Switzerland pursuant to Part II of the Mutual Assistance in Criminal Matters Act 2002 is unconstitutional and/or otherwise is an abuse of legal process; and

(vi) All necessary and consequential directions, as deemed fit, just and appropriate be given by this Honourable Court; and

(vii) The costs of this application arising thereof or incidental thereto to be paid by the respondent.

The facts leading to this application are these. On 10 February 2004, the applicant was charged at the Session Court in Kuala Lumpur under s. 409 of the Penal Code. The trial of the applicant's case commenced on 2 August 2004. On the said date, the prosecution tendered an alternative charge also under s. 409 of the Penal Code. Basically these charges alleged that the appellant had committed criminal breach of trust in his capacity as the Managing Director of Perwaja Rolling Mill and Development Sdn Bhd (Perwaja) on 18 February 1994 by dishonestly authorizing the payment of RM76.4 million into the account of a company, Filsham Enterprise Incorporated.

On 17 August 2004, in the midst of the trial, the Deputy Public Prosecutor informed the learned Sessions Court Judge, in relation to the respondent's request to the Judicial Authority of Hong Kong, under the Mutual Assistance in Criminal Matters Act 2002 (the Act), to get the assistance of the Magistrates Court in Hong Kong to record the taking of oral evidence of witnesses and production of documents pertaining to the trail of payment of RM76.4 million, into the account of Filsham Enterprise Incorporated at the American Express Bank Ltd. Hong Kong. The Deputy Public Prosecutor then applied to the learned Sessions Court Judge for an adjournment in order to give way to the Hong Kong proceedings. At the same time, the Deputy Public Prosecutor had also indicated that after Hong Kong, similar application may be made to the Legal Authority in Switzerland and Japan.

On 25 August and 26 August 2004, the respondent proceeded with the recording of evidence in Hong Kong. The applicant participated in the proceedings in Hong Kong.

Subsequently, on 22 October 2004, the applicant was informed by the respondent that similar proceedings under the Act for examination of witnesses in Geneva and Zurich, Switzerland had been fixed on 9 November 2004 and 10 November 2004 respectively.

The applicant filed this application on 8 November 2004 under certificate of urgency. The application was fixed for hearing on 9 November 2004.

Senior federal counsel, Cik Umi Kalthum binti Abdul Majid (Dato' Abdul Rahim bin Uda and Puan Azizah binti Haji Nawawi with her) appeared for the Attorney General. She raised several preliminary objections. Her objections were:

(i) The taking of evidence under the Act is part and parcel of the respondent's exercise of his prerogative under art. 145(3) of the Federal Constitution and that exercise of the respondent's prerogative is not amendable to review by the courts;

(ii) The civil courts should not interfere in the jurisdiction of the criminal courts. To do so will tantamount to an usurpation of the jurisdiction and powers which the Courts of Judicature Act 1964 has clearly granted to the criminal courts;

(iii) The request of the respondent under s. 8 of the Act is not in decision within the requirements and meaning of O. 53 of RHC; and

(iv) The request is spent as the request has already been acted upon by the appropriate authorities in Switzerland.

I will first deal on the issue whether a request under s. 8 of the Act is a decision within the requirements and meaning of O. 53 of RHC. To do so, it is necessary to reproduce the relevant parts of this order.

Scope (Order 53 r. 1)

(1) This order shall govern all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Application (O. 53 r. 2)

(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form III A.

(2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Leave (O. 53 r. 3)

(1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

(4) The Judge, may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

Clearly, under O. 53 r. 2(4), any person who is adversely affected by the decision of any public authority shall be entitled to make this application. The respondent being the Attorney General of Malaysia, is no doubt a public authority.

But the issue raised by the learned senior federal counsel was that the requests of the respondent to the Judicial Authority in Geneva and Zurich, Switzerland under the Act, were not decisions within the meaning of O. 53 r. 2(4) of RHC. With respect, I am unable to agree. Section 8(1) of the Act clearly relates to the powers and discretion conferred and imposed on the Attorney General. The section used words or phrases "may", "if he is satisfied", "there are reasonable grounds", "evidence would be relevant" and "request". All these words or phrases indicate discretionary decision needing to be made to result in the request. Thus, I am of the view that the requests by the respondent to the Judicial Authority in Geneva and Zurich, Switzerland were decisions within the requirements and meaning of O. 53 of RHC.

The next issue is whether the act of the respondent in recording the oral evidence of witnesses and for production of documents under s. 8(1) of the Act is amendable to review by this court. For ease of reference, the relevant sections of the Act is hereby produced:

Application of this Part

6. A request for assistance under this Part may be made to any foreign State.

Request to be made by or through Attorney General

7(1) A request by Malaysia to a foreign State for assistance in a criminal matter under this Part shall be made by or through the Attorney General.

(2) A request under subsection (1) shall be made through the diplomatic channel.

Request for taking evidence, etc.

8(1) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any evidence would be relevant to any criminal proceedings in Malaysia, request the appropriate authority of a foreign State to arrange for:

(a) such evidence to be taken in the foreign State; and

(b) the evidence to be sent to him.

(2) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any thing would be relevant to a criminal matter in Malaysia, request the appropriate authority of a foreign State:

(a) to assist in obtaining, by search and seizure if necessary, such thing in the foreign State or a photograph or copy of the thing; and

(b) to arrange for the thing or the photograph or copy of the thing to be sent to him.

(3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 (Act 56) and the Criminal Procedure Code (Act 593), be admitted as evidence at any criminal proceedings to which the request relates.

(5) In assessing the weight, if any, to be attached to any evidence received by the Attorney General pursuant to a request made under subsection (1) which has been admitted as evidence in any criminal proceedings to which the request relates, the court shall have regard to:

(a) whether it was possible to challenge the evidence taken; and

(b) whether the law of the foreign State concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was being taken.

Request for attendance of person in Malaysia

9(1) The Attorney General may request the appropriate authority of a foreign State to assist in arranging for the attendance in Malaysia of a person in the foreign State for the purpose of giving any evidence or assistance of he is satisfied that:

(a) there are reasonable grounds to believe that the person is capable of giving such evidence or assistance relevant to a criminal matter involving a serious offence; and

(b) the person consents to travel to Malaysia for the purpose of giving such evidence or assistance.

(2) The Attorney General may make arrangements with the appropriate authority of the foreign State for the purpose of the attendance of that person in Malaysia, his return to the foreign State and other relevant matters.

It was submitted by the learned senior federal counsel that the taking of evidence under the Act is for the purpose of tendering it for admission in the applicant's ongoing criminal trial. Thus, according to her, this is perfectly within the ambit and scope of the powers of the respondent under art. 145(3) of the Federal Constitution.

The learned counsel for the applicant, Dato' Shafee bin Abdullah (Encik Azizan bin Harun with him) contended otherwise. He submitted that the act of respondent under s. 8 of the Act is not covered by art. 145(3) of the Federal Constitution. Instead he submitted that the invocation of the provisions of the Act by the respondent in the midst of the applicant's criminal trial is an intrusion and interference with the judicial power of the Sessions Court. According to him, once the applicant's criminal trial commenced at the Sessions Court, in Kuala Lumpur, the Sessions Court was seized of the absolute power to hear its final conclusion and determine the charges against the applicant in the manner provided by Malaysian laws.

Article 145(3) of the Federal Constitution is in the following words:

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or court-martial.

Clearly to me, what the respondent did in Geneva and Zurich, Switzerland was not "to institute, conduct or discontinue any proceedings for an offence". The respondent cannot be said to be exercising his prerogative under art. 145(3) of the Federal Constitution. In fact, the respondent as the Attorney General of Malaysia, has no jurisdiction "to institute, conduct or discontinue any proceeding for an offence" outside Malaysia.

To me, to put it simply, what the respondent did in Geneva and Zurich, Switzerland was to seek assistance of the Judicial Authority there, to record evidence of witnesses and production of documents, which he wanted to use in the applicant's criminal trial in the Sessions Court, Kuala Lumpur. Thus, to me, the real issue in this application which need serious consideration is whether the act of the respondent in invoking s. 8 of the Act in the midst of the applicant's criminal trial, can be construed as an intrusion and interference with the judicial powers of the Sessions Court Judge.

Looking at the scheme of the Act, I am of the view that the act of the respondent does not amount to an intrusion or interference with the judicial powers of the Sessions Court Judge. To me, the recording of evidence in Geneva and Zurich, Switzerland under s. 8(1) of the Act is not a continuation of the applicant's criminal trial at the Sessions Court in Kuala Lumpur. The applicant's criminal trial has not shifted to Switzerland. It remains in Kuala Lumpur before the same Sessions Court Judge. The Sessions Court Judge's powers are still very much intact. This is because under the scheme of the Act, any evidence collected in Geneva and Zurich, Switzerland will still be subjected to the Sessions Court Judge scrutiny before such evidence can be admitted and considered.

Section 8(3) of the Act clearly stated that the admission of evidence received by the respondent in any criminal proceeding is subject to the provisions of the Evidence Act 1950 and Criminal Procedure Code. Thus, the admissibility of such evidence is open to challenge by the applicant before the Sessions Court Judge. Further, even if such evidence is admitted, s. 8(4) placed a duty on the Sessions Court Judge to assess the weight, if any, to be attached to such evidence, having regard to; (i) whether it was possible to challenge the evidence taken; and (ii) whether the law of the foreign state concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was taken. In fact, among the many complaints by the applicant was that he had been denied of public hearing and the right to cross-examine witnesses in Zurich and Geneva, Switzerland as well as he was not been given the right to be defended by counsel of his choice. Thus, to me, such complaints should be addressed to the Sessions Court Judge at the appropriate time as provided by s. 8(4) of the Act.

This brings me to another issue. As stated earlier, the taking of evidence in Geneva and Zurich, Switzerland by the respondent is for the purpose of adducing the said evidence in the applicant's ongoing criminal trial in the Sessions Court. The applicant in this application, in essence is trying to prevent it from happening. I am of the view, this course of action taken by the applicant is an abuse of the court process. This is because, this court being a civil court has no jurisdiction to review the proceedings before the Sessions Court, in exercising of its criminal jurisdiction. To me, any challenge by the applicant to the prosecution's attempt to adduce the evidence recorded in Geneva and Zurich, Switzerland should be made to the Sessions Court Judge. Whether such evidence is admissible or inadmissible is for the Sessions Court Judge to decide. Thus, to accede to the applicant's application will tantamount to this court to interfering with the jurisdiction of the Sessions Court. To me, it is totally unacceptable.

There are hosts of other complaints by the applicant against the respondent as can be gleaned from the applicant's affidavit in support. For example, the applicant questioned the respondent's decision of invoking s. 8(1) of the Act rather than s. 9 of the same Act. According to the applicant, had s. 9 of the Act been used by the respondent, witnesses from Zurich and Geneva, Switzerland would be produced at the Sessions Court in Kuala Lumpur for the purpose of taking their respective testimony and producing documents in their respective possession instead of doing so in Zurich and Geneva, Switzerland. This, according to the applicant could have saved the excessive expenses incurred by the respondent's contingent to travel to Switzerland as well as the exorbitant expenses incurred by the applicant to engage European lawyers to attend to the proceedings in Switzerland. But, I am of the view, the expenditure incurred by the respondent as well as the other personal complaints against the respondent by the applicant should be addressed elsewhere, but not to this court.

For the abovesaid reasons, the applicant's application for leave is refused resulting in the whole application be dismissed with costs.